IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MMILLA, J.A., MWANGESI, J.A., And WAMBALI, J.A.)

CIVIL APPEAL NO. 7 OF 2019

JUMA AKIDA SEUCHAGO ..... APPELLANT

VERSUS

SBC (TANZANIA) LIMITED .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Ngwembe J.)

Dated the 3rd day of September, 2018
in
Labour Revision No. 70 of 2017

.....

JUDGMENT OF THE COURT

12th & 18th June, 2020

MMILLA, JA.:

Juma Akida Seuchago (the appellant), is appealing against the judgment of the High Court of Tanzania (Labour Division) at Mbeya in Labour Revision No. 70 of 2017. That decision arose from Complaint No. CMA/MBY/14/2016 at the Commission for Mediation and Arbitration (the CMA) for Mbeya.

The brief background facts of the case are straight forward. The appellant was formerly an employee of the SBC (Tanzania) Limited (the respondent), in his capacity as the accountant of that company. In 2007, his employer suspected him to have committed an offence in consequence of which he was reported to police and subsequently criminal proceedings were commenced against him. During the pendency of those proceedings, the respondent suspended him from work and imposed a condition that he was required to report at his working station on every Monday until finality of those proceedings. In the course of the suspension however, the appellant faulted to report at work for a total of 365 days as a result of which disciplinary proceedings were initiated against him. He was found guilty and thereafter terminated from employment. Aggrieved, he filed the aforesaid complaint before the CMA.

The crux of the dispute before the CMA was unfair termination from employment. He also claimed repatriation and subsistence allowances from the date of termination to the date of repatriation.

After hearing the complaint, the CMA dismissed the appellant's claims on account that they were unfounded. It held that the termination

was fair, and that he was not entitled to get repatriation and subsistence allowances. That decision disgruntled the appellant. He thus filed an application for Revision in the High Court of Tanzania at Mbeya, asking for the following orders:-

(1) To call for and examine the records, proceedings and award dated 9.10.2017 delivered in Labour Dispute No. CMA/MBY/14/2016 and satisfy itself as to its correctness, legality or propriety;
(2) Revise that decision; and
(3) Make any other orders or reliefs which the court could deem fit and just to grant.

Three issues were framed in the course of hearing the application for Revision as follows:-

(1) Whether the termination was unfair;
(2) Whether the applicant was entitled to get repatriation allowance; and
(3) Whether the applicant was entitled to get subsistence allowance from the date of termination to the date of repatriation.

In its decision which was handed down on 3.9.2018, the learned High Court Judge answered the first and second issues in the negative. He explicitly found that the termination was fair, also that the appellant

had conceded that he was paid repatriation allowance, therefore disallowed that claim. As regards the third issue however, the High Court Judge agreed with the appellant's advocate that the appellant was entitled to be paid subsistence allowance from the date of termination on 28.12.2015 to 24.3.2016 when he was paid repatriation costs. However, the issue became: how much was he to be paid? After deliberations on the posed issue, the learned High Court Judge found and held that he was to be paid on the basis of his monthly wage salary for the period he awaited payment of repatriation costs which was three months. Once again, that decision dissatisfied him, hence this appeal to the Court.

The appellant's memorandum of appeal raised a lone ground as follows:-

> *"That the learned Honourable Judge erred in law and facts in ordering the appellant to be paid monthly salary for each month he waited to be repatriated by the respondent, instead of ordering that he be paid subsistence allowance from the date of termination to the date when the respondent employer repatriate him to the place of recruitment, to wit; Moshi."*

On the day of the hearing this appeal on 12.6.2020, the appellant appeared in person and unrepresented; whereas the respondent company enjoyed the services of Mr. Kamru Habibu, learned advocate.

Upon being invited by the Court to argue his appeal, the appellant prayed to adopt the written submissions he had lodged in Court. The essence of his written submission is that while the learned Judge correctly found that he was entitled to be paid subsistence allowance from the date of termination to the date of repatriation, he nevertheless erred in directing that he was to be paid monthly salary for the period he waited to be repatriated to the place of his domicile instead of a daily subsistence expenses for himself and his family members. He relied on section 43 (1) of the Employment and Labour Relations Act No. 6 of 2004 (the ELRA) and the case of **Elidhiaha Fadhili v. The Executive Director, Mbeya City Council**, Civil Appeal No. 24 of 2014 (unreported). He similarly faulted the learned Judge of the High Court for having based his decision on the Employment and Labour Relations (General) Regulations, 2017 (the ELR (G) R) which came into force on 24.2.2017 while the cause of action of this matter arose in 2015.

In his oral submission before us, the appellant stressed that prior to the enactment of the ELR (G) R, a person in his shoes was entitled to be paid subsistence allowance for himself and his family members (wife and children) and not monthly salary, and that in his case the rate was Tzs. 100,000/= as reflected in his schedule of claims appearing at page 11 of the Record of Appeal. He requested the Court to allow his appeal and rectify the error made by the High Court.

On his part, like the appellant, Mr. Habibu sought to adopt the reply to the appellant's written submissions they filed. He submitted in his written submissions that the High Court Judge was correct in ordering the appellant to be paid subsistence allowance which is equivalent to the monthly basic wage salary for the period he was awaiting repatriation. He added that though section 43 (1) (c) of the ELRA, 2004 contemplated the question of subsistence allowance in this regard, it nevertheless did not fix the rate, which is why under such circumstances the issue becomes: how much? This question, Mr. Habibu added, was addressed in the case of **Communication and Transport Workers Union of Tanzania COTWU (T) v. Fortunatus Cheneko**, Complaint No. 27 of 2008 (HC), Mandia, J. (as he then was), which was

followed in **Tanganyika Instant Coffee Co. Ltd. v. Jawabu W. Mutembei,** Revision No. 210 of 2013 (HC), Mipawa, J. (Rtd). In those cases, Mr. Habibu went on to submit, subsistence allowance was taken to be daily wage calculated on the basis of the monthly salary, which he said is good law and begged us to approve it.

Mr. Habibu's oral submission did not go beyond the contents of his written submissions. He emphasized that we should find sense in the reasoning of the court in the cases of **Communication and Transport Workers** and **Tanganyika Instant Coffee Co. Ltd** (supra).

In a short rejoinder to what Mr. Habibu said, the appellant repeated his request for us to allow his appeal and rectify that part of the decision in the ruling of the High Court.

We have impassively considered the competing arguments of the parties, and readily note that the High Court's decision that the appellant was entitled to be paid subsistence allowance from 28.12.2015 to 24.3.2016 during which time he awaited to be paid repatriation costs raised no strife. The only problem is on the mode of payment: should it be subsistence allowance which is equivalent to the monthly basic wage

salary as was found by the High Court, or a daily subsistence expenses for himself and his family members as is being contended by the appellant?

The situation facing the Court in the present case had been a subject of discussion in several other cases in the past, including those of **Communication and Transport Workers** and **Tanganyika Instant Coffee Co. Ltd** (supra) in which the focus was on the provisions of section 43 (1) (c) of the ELRA, 2004. That section provides that:-

> *"43 (1): Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either;-*
>
> *a) N. A.*
> *b) N.A.*
> c) *Pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2)* ***and daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and***

his family to the place of recruitment."" (The emphasis is added).

It is beyond certainty that the section contemplated the payment of subsistence allowance to a person awaiting repatriation; however as was observed in the above cited cases, it did not set the rate to be paid. In the decision subject of this appeal, the learned Judge of the High Court did not cite that provision, or any case referring to that situation, but we have cause to believe that he was aware of this situation, which is why he posed the issue: how much should be paid?

The reasoning of the learned High Court judge in **Communication and Transport Workers** (supra) on why it should be a monthly basic wage salary instead of a daily subsistence expenses for such a person and his family members is in our view appealing. It was stated in that case that:-

". . . Section 43 (10) (c) (sic: 43 (1) (c)) allows for daily subsistence expenses between the date of termination and the date of transportation . . . unfortunately, the Act did not prescribe the daily subsistence rate payable. Since (the) applicant's salary is (Tzs.) 370,000/= per month and the

appellant was subsisting on his salary at the place of his work, the daily subsistence allowance can be taken to be the daily wage calculated on the basis of the monthly salary. . . ."

Ipso facto, this was a perfect reasoning, and explains why it was subsequently incorporated into the ELR (G) R, 2017, emphasis being on Regulation 16 (1) thereof, which provides that:-

"The subsistence expenses provided for under section 43 (1) (c) of the Act shall be quantified to daily basic wage or as may, from time to time, be determined by the relevant wage board."

There are several other cases in which the Court directed payment of subsistence allowance basing on the monthly basic wage salary. In the cases of **Paul Yustus Nchia v. National Executive Secretary Chama cha Mapinduzi**, Civil Appeal No.85 of 2005 and **Gaspar Peter v. Mtwara Urban Water Supply Authority (Mtuwasa),** Civil Appeal No. 35 of 2017 (both unreported), the Court endorsed payment to the claimants on the basis of the monthly basic wage salary. We are firm that there is justification, and that it was, and still is, good law today.

Admittedly, the case of **Elidhiaha Fadhili** (supra) reflects the position being favoured by the appellant. In that case, while holding that the appellant was entitled to be paid subsistence allowance up to the date of repatriation as envisaged by section 43 (1) (c) of the ELRA, nonetheless the Court found that it was established that the rate was Tzs. 15,000/= instead of Tzs. 30,000/= per day. In the circumstances of the present case however, the rate of Tzs. 100,000/= preferred by the appellant for himself and his wife as well as Tzs. 50,000/= for the children per day, was not defended before the CMA because his evidence shows that he did not say anything in that regard. The record is totally silent - (see pages 27 to 31 in the Record of Appeal). Similarly, the appellant did not indicate the number of days he was entitled to be paid, nor did he come up with any specific amount of money he was entitled to be paid. Worse more, the CMA did not discuss, nor make any decision on this point. As such, we are constrained to agree with Mr. Habibu that the present case is distinguishable to **Fadhili's** case. We are firm therefore, that the learned High Court Judge in the present case rightly found that the appellant was to be paid on the basis of the

monthly basic wage salary for the period of three months he awaited to be repatriated.

That said and done, the appeal lacks merit and is henceforth dismissed in its entirety. We make no order as to costs.

Order accordingly.

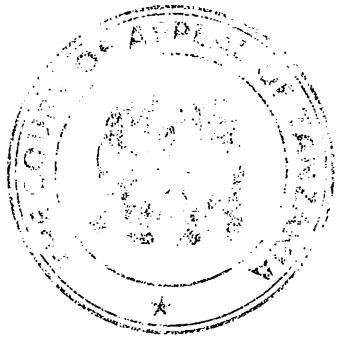
DATED at **MBEYA** this 17th day of June, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 18th day of June, 2020 in the presence of the appellant in person and Mr. Kamru Habibu, learned counsel for the respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL